No. 80-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEARN MOODY, JR.,
Petitioner,

v.

THARPE FORRESTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
Respondent,

SHEARN MOODY, JR.,
Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,
Respondent.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

INTRODUCTION

This joint brief in opposition is filed on behalf of Respondents, Protective Life Insurance Company ("Protective"), and Tharpe Forrester, Commissioner of Insurance of the State of Alabama, as Receiver of Empire Life Insurance Company of America ("Empire Receiver").

Petitioner, Shearn Moody, Jr. ("Moody"), was the chief executive officer and principal stockholder of Empire, an insolvent Alabama insurance company that reinsured Empire's policies during the course of receivership proceedings instituted

in 1972, pursuant to the *Alabama Insurance Code,* by the Commissioner of Insurance of the State of Alabama in the Circuit Court of Jefferson County, Alabama, a state court of general jurisdiction ("Alabama Receivership Court").

The instant petition is the most recent in a series of attempts by Moody to secure piecemeal review in this Court of the receivership proceedings conducted by the Alabama Receivership Court. This Court has to date denied seven of Moody's petitions for certiorari relating to the Empire receivership proceedings.[1]

The instant petition seeks review of the decision of the Fifth Circuit Court of Appeals in the consolidated cases of *Sumrall* v. *Moody* and *Protective Life Ins. Co.* v. *Moody,* 620 F.2d 548 (5th Cir. Dec. 15, 1980), *reh. denied,* ____ F. 2d ____ (5th Cir. Dec. 15, 1980), which enanimously affirmed certain judgments entered by the United States District Court for the Southern District of Texas on November 13, 1978 (Pet., App. C). The federal district court judgments in favor of respondents gave full faith and credit to money judgments entered against Moody by the Alabama Receivership Court. Prior to entry of the federal district court judgments below, the money judgments against Moody had been affirmed by the Alabama Supreme Court on Moody's direct appeal. 355 So. 2d 1116 (S. Ct. Ala.), *cert. denied,* 439 U.S. 910, 58 L. ed 2d 256 (1978).

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[1]Petitions have been denied in *Ex parte Shearn Moody, Jr.,* No. 76-1845, *cert. denied* 10/3/77, *reh. denied* 11/28/77; *Shearn Moody, Jr.,* v. *Texas,* No. 77-571, *cert. denied* 12/5/77, *reh. denied* 1/16/78; *Shearn Moody, Jr.* v. *State of Alabama, ex rel. Payne,* No. 77-428, *cert. denied* 12/12/77; *Shearn Moody, Jr. et al.* v. *Texas,* No. 77-873, *cert denied* 2/21/78; *Shearn Moody, Jr.* v. *State of Alabama ex rel. Payne,* No. 77-1109, *cert denied* 4/17/78; *Ex Parte Shearn Moody, Jr.,* No. 77-1041, *cert denied* 4/17/78; *Shearn Moody, Jr.* v. *State of Alabama ex rel. Payne,* No. 78-110, *cert. denied,* 10/16/78.

The money judgments were entered by the Alabama Receivership Court in the wake of a civil-contempt adjudication against Moody on April 30, 1975. No ordinary appellate review in the Supreme Court of Alabama was sought by Moody from the civil-contempt adjudication, and this Court denied Moody's petition for certiorari challenging the contempt adjudication in Case No. 76-1845.[2] The civil-contempt adjudication, in turn, was based on Moody's violation of an injunction entered by the Alabama Receivership Court on January 6, 1975. Moody appealed the injunction to the Supreme Court of Alabama, *Moody* v. *State ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). The Alabama Supreme Court unanimously affirmed the injunction, holding that "[t]he injunction [against Moody] was not only justified but was necessary to preserve the assets of Empire." 295 Ala. at 306, 329 So. 2d at 79. Moody sought no timely appellate review in this Court of the decision of the Alabama Supreme Court affirming the January 6, 1975 injunction. Moody did, however, unsuccessfully attempt a collateral attack upon the injunction by petition for certiorari filed in this Court in Case No. 77-1041.[3]

The opinions of the Fifth Circuit Court of Appeals which are sought to be reviewed by the instant petition are attached to the petition as Appendix A and B. Citations of some of the other reported decisions in this litigation are listed below:

Moody v. *State ex rel. Payne,* 355 So. 2d 1116 (S. Ct. Ala. 1978);

Moody v. *State ex rel. Payne,* 351 So. 2d 552 (S. Ct. Ala. 1977);

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[2]*Ex parte Shearn Moody, Jr.,* No. 76-1845, *cert. denied* Oct. 3, 1977, *reh. denied* Nov. 28, 1977.

[3]*Ex parte Shearn Moody, Jr.,* No. 77-1041, *cert. denied* Apr. 17, 1978.

Moody v. *State ex rel. Payne,* 351 So. 2d 547 (S. Ct. Ala. 1977);

Ex parte Shearn Moody, Jr., 351 So. 2d 538 (S. Ct. Ala. 1977);

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Moody v. *State, ex rel. Payne,* 295 ala. 299, 329 So. 2d 73 (1976);

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Moody v. *Moody Nat'l Bank,* 522 S.W.2d 710 (Tex. Civ. App.—Houston 1975, n.r.e.);

Moody v. *Texas,* 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e. 1977).

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*Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

REASONS WHY THIS COURT SHOULD DENY MOODY'S PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

1. Moody's Petition Inaccurately Presents the Case.

Petitioner has failed to present with accuracy matters that are essential to an adequate understanding of this case. The abstract question that Moody contends this Court ought to review is whether the decision in *Donovan* v. *City of Dallas,* 377 U.S. 408 (1964), forbids the Alabama Receivership Court from enjoining "in personam federal court litigation that might affect the state litigation but that would not require the federal court to act in rem or seek custody or control of the res." [Pet. at *i*]

The injunction to which the petition refers was entered by the Alabama Receivership Court on January 6, 1975. The injunction prohibited Moody from filing any lawsuit or amended complaints against the Empire Receiver or Protective, without first obtaining the receivership court's approval. Simply stated, the injunction prohibited Moody from interfering with the receivership estate and the receivership proceedings. After the injunction had been entered against him, Moody petitioned the Alabama Supreme Court to issue extraordinary writs of mandamus and prohibition declaring the receivership court's injunction invalid. The Alabama Supreme Court denied extraordinary relief (S. Ct. Ala. No. 1125). Moody applied for, and was refused, rehearing (*id.*). Moody then perfected an appeal from the injunction, and the Alabama Supreme Court affirmed. *Moody* v. *state ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). No timely review of the affirmance of the injunction by the Alabama Supreme Court was sought in this Court.

During the pendency of Moody's appeal to the Alabama Supreme Court challenging the validity of the receivership court's injunction against him, an amended complaint was filed

by Moody's lawyers in the case of *Allmon* v. *Bookout*[4] The *Allmon* amended complaint sought to nullify every single order of the receivership court from the time that receivership proceedings were instituted against Empire in 1972. Immediately after the amended complaint was filed, the receivership court was petitioned to issue a show-cause order and to enter a civil-contempt adjudication against Moody. After an evidentiary hearing, Moody was adjudicated in civil-contempt by order entered April 30, 1975. In the meanwhile, determination of the amount of damages sustained by Protective and the Empire Receiver as a result of Moody's contempt was postponed.

On August 19, 1976, after the *Allmon* action had been dismissed as moot on the grounds that Allmon had voluntarily surrendered his Empire policy and, at any rate, had not in any way been injured by the receivership proceedings, Protective and the Empire Receiver filed claims in the receivership proceeding for compensatory and exemplary damages against Moody.[5] Thereafter, trials were conducted to determine the amount of damages resulting from Moody's contempt, *i.e.*, Moody's sponsorship of the *Allmon* action in open violation of the January 6, 1975 injunction of the receivership court. At the conclusion of the damage hearing conducted on Protective's

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[4]*Allmon* v. *Bookout, et al.*, No. 74-377-N (M.D. Ala. 1974); No. 75-2104 (5th Cir.) The *Allmon* litigation is described in the Fifth Circuit's opinions challenged by the instant petition. (Pet., App. A & App. B.)

[5]It is authorized under Alabama law to have damages resulting from civil contempt determined in an ancillary proceeding conducted in the case out of which the contempt arose. *Lightsey* v. *Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 315 So. 2d 431 (1975). This procedure was specifically approved by the decision of the Supreme Court of Alabama which affirmed the money judgments enforced by the federal courts below. *Moody* v. *State ex rel. Payne*, 355 So. 2d 1116 (S. Ct. Ala. 1978), *cert denied*, 439 U.S. 910, 58 L. ed 2d 256 (1978).

claim, the receivership court entered extensive findings of fact and conclusions of law and judgment in favor of Protective in the total amount of $176,008. Trial of the Empire Receiver's claim for damages against Moody resulted in a jury verdict and judgment in favor of the Empire Receiver in the amount of $100,000. On Moody's appeal from the damage judgments, the Supreme Court of Alabama reduced the amount of the judgment in favor of Protective to $165,228.50. The judgment in favor of the Empire Receiver was reduced to $68,115.78. The judgments, as corrected, were affirmed and rendered. A petition for a writ of certiorari in this Court ensued. The sole issue presented by that petition was the same as that asserted in the instant petition, *i.e.*, whether the money judgments against Moody were invalid under the case of *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964). On October 16, 1978, this Court denied such review. 439 U.S. 910, 58 L. ed 2d 256.

The foregoing matters are not accurately presented in the instant petition and, together with the extensive record on which the foregoing developments are based, are essential to an adequate understanding of the points requiring consideration. Moreover, the decisions which are challenged by the instant petition are predicated on the full faith and credit mandate incorporated in 28 U.S.C. Section 1738, but such controlling authority is not even addressed by the instant petition. Accordingly, under Rule 21.5 of this Court, the instant petition is due to be denied.

2. **The Federal Courts Below Properly Concluded That The Alabama Judgments Were Entitled To Full Faith And Credit.**

The federal courts below accorded the Alabama damage judgments full faith and credit under 28 U.S.C. §1738.[4] We submit this conclusion was required by the clear, direct mandate of section 1738 and is inescapably correct.

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[4]The full text of section 1738 is set forth in the Appendix to our Brief.

Section 1738 provides in pertinent part that the authenticated records and judicial proceedings of a state court "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such state ...." There is no doubt that the Alabama Receivership Court, a court of general jurisdiction, was fully empowered under Alabama law to enter the money judgments against Moody and possessed subject matter jurisdiction and plenary personal jurisdiction over Moody (R. 203 & 517). Under such circumstances, the Alabama judgments are immune from collateral attack by law and usage in the State of Alabama. *E.G., Constantine* v. *Constantine,* 261 Ala. 40, 42, 72 So. 2d 831 (1954); *see Jordan* v. *Guaranty Pest Control, Inc.,* 292 Ala. 601, 606, 298 So. 2d 244 (1974). The Alabama judgments have withstood direct attacks by Moody on appeal to the Supreme Court of Alabama[7] and on petition for certiorari in the United States Supreme Court.[8]

In this Court, as in the lower federal courts, Moody attempts collateral attack upon the Alabama judgments. Moody's petition ignores the firmly established rule that "in a suit on a judgment of a state court, predicated on proper jurisdiction over the subject matter and person ... the judgment is not subject to collateral attack." *Midessa Television Co., Inc.* v. *Motion Pictures for Television, Inc.,* 290 F. 2d 203, 204 (5th Cir. 1961) ("[I]n a suit on a judgment of a court of one of the states, full faith and credit requires the enforcement of the judgment unless it is shown that the judgment was entered without jurisdiction").

State-court judgments, such as those collaterally attacked by Moody, are entitled to summary enforcement in federal court.

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[7] *Moody* v. *State ex rel. Payne,* 355 So. 2d 1116 (S. Ct. Ala. 1978).

[8] *Shearn Moody, Jr.* v. *Alabama ex rel. Payne,* No. 78-110, *cert. denied,* 439 U.S. 910, 58 L. Ed. 2d 256 (1978); *see* R. at 241-42 & 529-32.

> "28 U.S.C. § 1738 provides that the authenticated acts, records, and judicial proceedings of all state and territorial courts 'shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.' Under the compulsion of this statute federal courts are required to give full effect to the final judgments of state courts, subject only to narrowly circumscribed avenues of collateral attack. Midessa Television Co. v. Motion Pictures for Television, Inc., 5 Cir. 1961, 290 F. 2d 203."

Hazen Research, Inc. v. *Omega Minerals, Inc.*, 497 F. 2d 151, 153 (5th Cir. 1974) (summary calendar). *Accord, Hogan* v. *Morris*, 424 F. 2d 424, 425 (5th Cir. 1970) (summary calendar); *First American Ins. Co.* v. *O'Connor*, 392 F. 2d 588 (5th Cir. 1968); *Government Personnel Mut. Life Ins. Co.* v. *Kaye*, 584 F. 2d 738 (5th Cir. 1978) (summary calendar).

As no jurisdictional claim is or can be made[9] by Moody against enforcement of the Alabama judgments, they are immune from collateral attack, and federal courts are required to give full effect to them. Based on the foregoing authorities and analysis, the petition is due to be denied because the decisions of the federal courts below enforcing the Alabama judgments against Moody are proper in every respect and were required by 28 U.S.C. § 1738.

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[9] Moody actively litigated the jurisdictional issues in the Alabama trial court (R. 118, 119, 127 & 434, 128-30, 432) and was unsuccessful, both in the trial court (R. 168-70 & 482-84) and in the Supreme Court of Alabama (R. 203 & 517). Thus, Moody cannot collaterally attack in this Court or the federal courts below the determination of the jurisdictional issues by the Alabama courts. *Hazen Research, Inc.* v. *Omega Minerals, Inc.*, 497 F. 2d 151. 153 & 154 n.2 (5th Cir. 1974), *citing Durfee* v. *Duke*, 375 U.S. 106 (1963); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

3. The Circuit Court Below Correctly Decided The Question Presented By The Instant Petition.

The Fifth Circuit Court of Appeals correctly decided the issue Moody seeks to have reviewed. The Fifth Circuit, like the federal district court below and the Alabama Supreme Court before it, concluded that the damage judgments against Moody were based on his violation of an injunction entered by the Alabama Receivership Court which prohibited Moody from interfering with the receivership proceeding. *See* App. A, at 3a-9a; App. B at 6a-8a; App. C at 9a-10a; *Moody* v. *State,* 329 So. 2d 73 (S. Ct. Ala. 1976).

The instant petition glibly overlooks that Moody flagrantly violated the injunction and that Moody's raw violation of the injunction sought destruction of the receivership proceedings, including a federal-court injunction restraining enforcement or carrying out of any order or judgment entered by the Alabama Receivership Court.

It appears on the face of the receivership-court injunction that Moody was restrained from participating in the filing of the *Allmon* amended complaint "unless . . . Shearn Moody, Jr., . . . shall first receive the prior approval of this Court." It is undisputed that Moody never sought approval from the receivership court prior to the filing of the *Allmon* amended complaint, and he never sought to have the injunction dissolved or modified. Rather, Moody appealed the injunction to the Supreme Court of Alabama in 1975. There, he made exactly the argument he now urges this Court to adopt, namely that the injunction violates the rule of *Donovan* v. *City of Dallas, supra.* In its decision reported in February 1976, the Supreme Court of Alabama rejected Moody's argument:

> "Most of [Moody's] brief and most of his oral argument were devoted to the proposition stated in *Donovan* v. *City of Dallas,* 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964), that 'state courts are completely without power to

restrain federal-court proceedings in the personam actions.' This principle is not new to us. *Donovan* was cited and applied by this court in *Johnson* v. *Brown-Service Ins. Co.*, 293 Ala. 549, 307 So. 2d 518 (1974).

. . .

"Moody made this argument in trying to show that the filing of the case of *Allmon* v. *Bookout* was not in violation of the injunction issued by [the receivership court].

"It is interesting to note that the same paragraph in which the previous quote [from *Donovan*] appears begins with some careful writing and limitation by Justice Black, the author of the opinion:

> 'Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida* v. *Thompson,* 305 U.S. 456, 467-468, 59 S. Ct. 275, 280, 281, 83 L. Ed. 285. In *Princess Lida* this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." [citations omitted].

> "We have already shown that these suits [sponsored by Moody] were repeated attempts to remove assets from the res of the receivership and liquidation proceedings. The federal courts have consistently

> followed the rule that proceedings involving the liquidation of the business and assets of an insurance corporation are in rem or quasi in rem proceedings. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 194-95, 55 S. Ct. 386, 388, 79 L. Ed. 850, 854-55; *Jacobs* v. *DeShetter,* 465 F. 2d 840 (6th Cir.); *Gillis* v. *Keystone Mut. Casualty Co.,* 172 F. 2d 826, 829 (6th Cir.), *cert. denied,* 338 U.S. 822, 70 S. Ct. 67, 94 L. Ed. 499; *Holley* v. *General American Life Ins. Co.,* 101 F. 2d 172 (8th Cir.), *cert. denied,* 307 U.S. 615, 59 S. Ct. 1038, 83 L. Ed. 1496; *Liberty National Ins. Co.* v. *Reinsurance Agency, Inc.,* 307 F. 2d 164, 168 (9th Cir.); *Hutchins* v. *Pacific Mut. Life Ins. Co.,* 20 F. Supp. 150, 152 (S.D. Cal.), Aff'd, 97 F. 2d 58, 60 (9th Cir.).
>
> . . . We are convinced that [the receivership court] did not violate either the letter or the spirit of *Donovan.*"

Moody v. *State ex rel. Payne,* 295 Ala. at 307-08, 329 So. 2d at 79-80 (1976).

Based on its independent review of Moody's *Donovan* claim, the Fifth Circuit Court of Appeals was convinced that the *Allmon* case sought the destruction of the receivership and the Empire Receiver's possession and control of the assets of Empire. (Pet., App. B at 7a-8a). Because the Fifth Circuit's analysis and application of the in rem/quasi in rem exception to the *Donovan* principle are manifestly correct, the instant petition is due to be denied.

4. The Decision Of The Fifth Circuit Is Not In Conflict With Other Decisions.

The decision of the Fifth Circuit is not in conflict with any decision of another federal court.

The petition asserts a "clear conflict within four federal circuits." (Pet. at 15). No such conflict exists, and the cases cited by petitioner provide no reason for granting the instant petition.[10] Unlike any of the three cases cited in the petition, the injunction violated by Moody in the case at bar was based on undisputed evidence of Moody's persistent campaign to rule or ruin the Empire receivership proceedings with litigation and on testimony of Moody's threats to pursue the then Empire Receiver with litigation until it killed him. 295 Ala. at 304, 329 So. 2d at 76. Unlike the federal-court litigation in the cases cited in the petition, the *Allmon* litigation which Moody sponsored sought to restrain enforcement of every order or judgment entered by the Alabama Receivership Court and declaratory judgment that all actions taken by the Alabama Receivership Court were null and void. On these grounds, the federal circuit court below was convinced that the *Allmon* litigation which Moody sponsored in violation of the Alabama Receivership Court's injunction was "in hostile competition with the Receiver to wrest control and possession of Empire's assets and the Alabama orderly administration of the receivership out of the hands of the Receiver and Alabama Receivership Court." (Pet., App. B at 8a).

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[10] *Central States, Southeast & Southwest Areas Health and Welfare Fund* v. *Old Security Life Ins. Co.*, 600 F. 2d 671 (7th Cir. 1979); *Mills* v. *Roanoke Indus. Loan & Thrift*, 70 F.R.D. 448 (W.D. Va. 1975); *Slotkin* v. *Brookdale Hospital Center*, 357 F. Supp. 705 (S.D.N.Y. 1972). *Central States* involved appellate review of a district court order denying a motion to dismiss. The state-court injunction involved there was not specifically targeted against a particular litigant whom an evidentiary hearing had established was attempting to destroy, via litigation, the state receivership proceedings. The federal suit there, unlike the instant case, was purely *in personam*. The appellant in *Central States* admitted that the district court was not obligated to honor the state-court injunction, and the holding was simply that denial of a motion to dismiss the federal action was not a final, collateral order sufficient to support an appeal. 600 F. 2d at 677. The district court in *Mills* noted that the relief sought in the federal-court action there in-

As the Fifth Circuit's decision below is fully consistent with the decision of this Court in *Donovan* v. *City of Dallas,* and in no way conflicts with any decision of another federal court, the petition is due to be denied.

5. This Court Previously Denied Certiorari To Review The Alabama Judgments.

This court has previously declined to review the money judgments rendered by the courts of Alabama which were enforced by the federal courts below. The Alabama trial court entered judgment in favor of Protective on November 16, 1976; after trial by jury, the judgment in favor of the Empire Receiver was rendered on December 3, 1976. Moody appealed both judgments to the Alabama Supreme Court. The judgments, after slight reduction in amount, were there affirmed, and Moody thereafter petitioned this Court for writ of certiorari to the Supreme Court of Alabama. *Moody* v. *State ex rel. Payne,* 355 So.2d 1116, *cert. denied,* 439 U.S. 910, 58 L. Ed 2d 256 (1978). On that occasion, the sole issue Moody sought to have reviewed by this Court was the same issue as he seeks to raise by the instant petition, *i.e.* that the damage judgments against him were based upon a civil-contempt adjudication that, in turn, was based upon an injunction that was claimed to be invalid under the decision of this Court in *Donovan* v. *City of Dallas.* The petition was denied on October 16, 1978. The same result should obtain in this renewed collateral attack by Moody.

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volved was purely *in personam;* no facts remotely similar to the evidentiary basis for the state-court injunction in the case at bar were involved in *Mills;* the court there held simply that abstention doctrines were inapplicable. Likewise, in *Slotkin,* the federal district court held that a federal cause of action to decide a claim against funds being administered by the state court in no way interfered with the state court's custody and control of the receivership estate. 357 F. Supp. at 708.

6. Contrary To Assertions In The Petition, Moody Was Not Deprived Of Any Federal Right.

Petitioner was not deprived of any federal right, privilege or immunity. Throughout, the petition implies that enforcement of the Alabama Receivership Court's injunction deprived Moody of his constitutional rights. (Pet. at 3, 7, 8, 10, 12 & 17). The petition attempts to gloss over the stark reality that Moody had absolutely no federally guaranteed right to participate in the *Allmon* litigation. Moody was neither a party litigant in *Allmon* nor a member of the class of persons—Empire policyholders—ostensibly represented in the *Allmon* case. It is well settled that one party will not be allowed to assert in this Court the federal rights of another. *See Laird* v. *Tatum,* 408 U.S. 1, 15, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972). Accordingly, Moody's attempt in this case to assert purported federally secured rights of Empire policyholders is to be rejected. As no other deprivation is claimed by Moody, the conclusion is inescapable that the petition is due to be denied for lack of a jurisdictional basis for review by this Court.

7. The Petition Is Not Timely.

The only issue presented by the instant petition was conclusively decided against Moody by the Supreme Court of Alabama in February 1976, in the decision that disposed of Moody's appeal from the injunction of January 6, 1975. *Moody* v. *State ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). As we demonstrate under point 3, *supra,* the Alabama Supreme Court rejected as meritless Moody's claim that the injunction of the receivership court violated *Donovan.* The Alabama Supreme Court reiterated this holding in *Moody* v. *State ex rel. Payne,* 351 So. 2d 552, 554 (S. Ct. Ala. 1977). Moody sought no timely review by this Court of the 1976 decision of the Alabama Supreme Court rejecting his *Donovan* Claim. Yet, the petition now before this Court does not even acknowledge that the only

issue presented by it was decided against Moody nearly five years ago. For the independent reason that the purported federal question presented by the instant petition could only have been, but was not, presented by Moody after the 1976 decision by the Alabama Supreme Court, the instant petition is due to be denied.

8. **The Petition Is Factually Inaccurate.**

Many of the bold factual statements asserted in Moody's petition are belied by the record on appeal. For example, Moody did not intervene in the receivership proceedings "on a limited basis." (Pet. at 4). He entered a general appearance and actively participated in a two week trial (R 52-68) at the conclusion of which the Court approved Protective's plan to reinsure Empire's policies. Moody also submitted a plan for rehabilitation. *Moody* v. *State ex rel. Payne,* 344 So. 2d 160, 164 (S. Ct. Ala. 1977). Moody not only assisted Allmon "by providing him with counsel" (Pet. at 5); he drafted the amended complaint the filing of which—the very day after the Alabama Supreme Court denied Moody's challenge to the injunction on petition for extraordinary writ—resulted in the civil contempt adjudication and ultimately the damage judgments enforced by the Courts below. Moody's frequent assertions that the Alabama Receivership Court's jurisdiction was based on his "limited" participation are false (Pet. at 4, 6). *E.g.,* R 103-119, 122-130, 154-162, 425-429, 432, 434. Because Moody has failed to set forth an accurate, concise statement of facts material to consideration of the question presented, the instant petition should be denied.

9. **The Petition Provides No Basis For Moody To Evade Liability For Contempt.**

Petitioner cannot escape liability for contempt at this stage. Even if it be assumed, *arguendo,* that the Alabama Receivership Court's injunction was invalid under *Donovan,* and that the Alabama Supreme Court erroneously decided this issue in 1976,

and that the federal district and circuit courts below also erroneously decided this issue, Moody cannot thereby escape his liability for contempt after disobeying the injunction. *Cf. Walker* v. *City of Birmingham,* 388 U.S. 307 (1967). Accordingly, the money judgments that establish the amount of Moody's liability present no occasion for granting the instant petition.

CONCLUSION

Moody's pecksniffian arguments grossly distort the years of litigation that culminated in the Alabama damage judgments which the federal courts below accorded full forth and credit pursuant to the congressional mandate of 28 U.S.C. § 1738. This case truly involves no question of federal independence from state-court interference; it involves no departure by the federal courts below from this Court's decisions; and it involves no "collection-agency" adjudications by the many seasoned federal and state judges who have rejected Moody's boot-strap *Donovan* claim. The sole claim sought to be asserted by the petition has been rejected by each of the following: the trial and appellate courts of Alabama; the Alabama federal district court before which the *Allmon* case was pending; the Texas federal district court that enforced the Alabama damage judgments; and by the Fifth Circuit in its original decision and, again, in its decision on Moody's application for rehearing. The instant petition itself admits that this Court has thrice denied certiorari to review the issue. (Pet. at 15 & n.8). Contrary to Moody's assertion, this case manifests no judicial bias against him or "impatient rush to be rid of petitioner." (*Id.)* Rather, the petition embodies the incessant and scornful disregard by Moody for judicial proceedings that resulted in the damage judgments rendered against him over four years ago. The petition should be summarily denied. As we have shown, the petition is

frivolous, and this Court should award respondents appropriate damages under Rule 49 of the Rules of the Supreme Court.

Respectfully submitted,

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Proof Of Service

Proof of service of three copies of Respondents' Joint Brief in Opposition to Petition for a Writ of Certiorari, upon all parties separately represented by counsel, was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

APPENDIX

APPENDIX

The full text of section 1738 is as follows:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

28 U.S.C. § 1738.